WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, DC

ORDER NO. 3839

IN THE MATTER OF: Served November 4, 1991

Application of RUCHMAN AND ASSOCIATES, INC., Trading as RAI, INC., for Temporary Authority -- Contract with United States Department of Agriculture, Animal and Plant Health Inspection Service) Case No. AP-91-31

By application accepted for filing on October 1, 1991, Ruchman and Associates, Inc., trading as RAI, Inc. (RAI or applicant), seeks temporary authority to transport passengers, together with mail in the same vehicle as passengers, in irregular route operations between points in the Metropolitan District pursuant to a contract with the United States Department of Agriculture, Animal and Plant Health Inspection Service (APHIS).

The record indicates that APHIS requires regularly-scheduled shuttle transportation for government employees together with official government mail between the Agriculture South Building at 14th and Independence Avenue, S.W., Washington, DC, and the Federal Building, 6505 Belcrest Road, Hyattsville, MD, with stops at the Liberty Center Building, 14th Street, S.W., and the General Accounting Office, G Street, N.W. Scheduled service is required beginning at 7 a.m. and ending at 5:30 p.m. on government workdays. To operate this service, applicant proposes to use two 1990 vehicles, each seating 20 - 21 persons.

By Order No. 3827, served October 7, 1991, notice of this application was given. Order No. 3827 directed that protests, if any, be filed in accordance with Commission Rule No. 13 and Commission Regulation No. 54-04(a) no later than Thursday, October 17, 1991. A letter in the nature of a protest was received from a representative of DD Enterprises, Inc., trading as Beltway Transportation Service (Beltway). The letter was unnotarized and did not meet the requirements of Commission Regulation No. 54-04(a). In substance the letter states that Beltway is registering a formal protest against RAI in this case (and in Case No. AP-91-32, Application of Ruchman and Associates, Inc., trading as RAI, Inc., for a Certificate of Authority -- Irregular Route Operations). The letter, dated October 3, 1991, states that RAI ". . . was awarded and is operating a contract for U.S.D.A./APHIS since October 1, 1991." Beltway's representative further states that the formal protest is based on the fact that RAI is in willful violation of WMATC regulations. Attached to Beltway's letter is a copy of a letter from APHIS's contracting officer indicating that the APHIS contract had been awarded to RAI and not to Beltway. On October 17, 1991, RAI's representative responded to Beltway's allegations by unnotarized letter. RAI states that it was awarded the APHIS contract at issue in this case and performed the contract for 5 days beginning October 1, after which it contracted with a certificated WMATC carrier to perform the operations in its

behalf. RAI's representative states that it began operation of the contract on the scheduled date of October 1, 1991, to avoid liability for any damages resulting from default on the contract. RAI's representative states that RAI was not in willful violation of WMATC authority since it applied for temporary authority and permanent authority on September 24, 1991, and was under the impression that its application would be approved that same day. RAI's position is that it violated Commission regulations unknowingly and, as soon as it realized it was in violation, brought itself into compliance by hiring a carrier holding a WMATC certificate to perform the operations. RAI's admissions corroborate otherwise unsubstantiated allegations made not under oath.

The Compact, Title II, Article XI, Section 13(a) provides that:

> When the Commission finds that there is an immediate need for service that is not available, the Commission may grant temporary authority for that service without a hearing or other proceeding up to a maximum of 180 consecutive days, unless suspended or revoked for good cause.

In addition, fitness of the applicant is also an issue. See Order No. 3827 and other orders cited therein. Accordingly, to grant temporary authority, the Commission must determine that (1) there is an immediate need for service; (2) that service is not available; and (3) the applicant is fit to provide that service. Fitness involves considerations of compliance fitness, financial fitness, and operational fitness.

As discussed below, the Commission finds that the service is available and, therefore, denies the application for temporary authority. The other issues are resolved in favor of applicant.

On the basis of the award of the contract and the letter of APHIS's contracting officer, we find that there is an immediate need for the service. On the basis of sworn and unchallenged information contained in the application, the Commission finds applicant to be financially fit and operationally fit as to the subject matter of this application. Applicant's compliance fitness is challenged by Beltway on the basis that applicant operated the service without authority. Despite defects in Beltway's protest, applicant admits operating for five days without authority before hiring a WMATC-certificated carrier to provide the service. Applicant alludes to its "impression" that its application would be "approved" on September 24, 1991, the day it was filed. Applicant well knew that its application was rejected the day it was filed because of certain defects specified in the Commission staff's letter of September 24 to applicant. Further, applicant signed a sworn statement that it was familiar with the Compact and the Commission's rules and regulations and, therefore, should not have been under such an "impression." Accordingly, it is reasonable to conclude that the violations that occurred on and after October 1 were willful. The record, specifically applicant's letter dated October 15, 1991, would appear to support the conclusion that, torn between default on its contract and operations in violation of the Compact, applicant decided -- for whatever reason -- to conduct

the operations. Nevertheless -- and we think significantly -- applicant quickly recanted its decision, ceased the operations, hired at its own expense another carrier to conduct the operations, and continued to press its application. Determination of compliance fitness is prospective in nature. In other words, the exercise is to determine whether the carrier will comply in the future. We think it reasonable to conclude from the record before us that RAI committed the violation, realized the potential gravity of its error, corrected the error, and bore the expense involved in doing so. We find that in so doing applicant has established its prospective compliance fitness adequately in this case.

Now we are left to consider whether the service is available. Although Beltway could have asserted its availability to provide the service, it did not. It might be possible to conclude from a copy of a document submitted by Beltway that Beltway bid on the APHIS contract and, therefore, is available to provide the service. In any event, the fact remains that RAI contracted to provide service it did not have authority to perform and has secured the services of a certificated carrier to meet its contractual obligations. We cannot find that the service is not available when it is asserted by applicant that the service is being lawfully provided by another carrier.

THEREFORE IT IS ORDERED that the application of Ruchman and Associates, Inc., for temporary authority is Case No. AP-91-31 is hereby denied.

BY DIRECTION OF THE COMMISSION; COMMISSIONERS DAVENPORT, SCHIFTER, AND SHANNON:

William H. McGilvery
Executive Director